173

No. 10-402

Supreme Court, U.S.
FILED
OCT 25 2010
OFFICE OF THE CLERK

In The
Supreme Court of the United States

TUCK-IT-AWAY, INC., et al.,

Petitioners,

v.

NEW YORK STATE URBAN DEVELOPMENT CORPORATION, d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of New York

BRIEF OF AMICUS CURIAE NEW YORK STATE SENATOR BILL PERKINS IN SUPPORT OF PETITIONERS

DENISE OUTRAM*
Harlem State Office Building,
Suite 912
163 West 125th St.
New York, NY 10027
212-222-7315
doutram@nysenate.gov

AMY LAVINE
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
518-472-5849
alavine@albanylaw.edu

**Counsel of Record*

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS CURIAE	1
STATEMENT OF THE CASE	1
SUMMARY OF REASONS TO GRANT THE PETITION	2
REASONS TO GRANT THE PETITION	3
I. THE COURT OF APPEALS IGNORED THE MINIMUM FIFTH AMENDMENT SAFEGUARDS THIS COURT ARTICULATED IN *KELO* AND ABDICATED ITS RESPONSIBILITY OF JUDICIAL REVIEW	3
II. THE BURDENS OF BLIGHT AND ECONOMIC DEVELOPMENT CONDEMNATIONS HAVE AND WILL CONTINUE TO FALL DISPROPORTIONATELY UPON RACIAL AND ETHNIC MINORITIES AND THE ECONOMICALLY DISADVANTAGED	7
A. URBAN REDEVELOPMENT CONDEMNATIONS HAVE HISTORICALLY BEEN USED TO TARGET LOW-INCOME AND RACIALLY DIVERSE NEIGHBORHOODS	8

TABLE OF CONTENTS – Continued

Page

B. AS EXEMPLIFIED BY THIS CASE, BLIGHT REMOVAL AND ECONOMIC DEVELOPMENT CONDEMNATIONS CONTINUE TO HAVE DISPROPORTIONATE IMPACTS ON MINORITIES AND THE ECONOMICALLY DISADVANTAGED 12

III. THE COURT OF APPEALS' HOLDING THAT ESDC DID NOT VIOLATE PETITIONERS' DUE PROCESS BY WILLFULLY OBSTRUCTING THEIR FOIL REQUESTS WAS INCORRECT AND DEMONSTRATES THE NEED FOR THIS COURT TO ESTABLISH MINIMUM STANDARDS FOR PROCEDURAL DUE PROCESS IN THE CONDEMNATION PROCESS..... 23

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Berman v. Parker, 348 U.S. 26 (1954) 8, 9, 10, 12

Cincinnati v. Vester, 281 U.S. 439 (1930).....6

Fink v. Lefkowitz, 47 N.Y.2d 567 (1979) 23

Karesh v. City Council, 247 S.E.2d 342 (S.C. 1978).....13

Kelo v. New London, 545 U.S. 469 (2005).....*passim*

Levin v. Township of Bridgewater, 57 N.J. 506 (1971).....13

Marbury v. Madison, 5 U.S. 137 (1803).....5

Matter of Goldstein v. Urban Development Corporation, 13 N.Y.3d 511 (2009) 19

Matter of Kaur v. N.Y.S. Urban Dev. Corp., 72 A.D.3d 1 (App. Div. 1st Dep't 2009).....4, 5

Matter of Kaur v. N.Y.S. Urban Dev. Corp., 15 N.Y.3d 234 (2010).....4, 5, 6

Matter of Uptown Holdings, LLC v. City of New York, 2010 N.Y. Slip Op. 07227 (App. Div. 1st Dep't 2010) 6

Matter of West Harlem Bus. Group v. ESDC, 13 N.Y.3d 882 (2009).....23

NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978).....23

Poletown Neighborhood Council v. City of Detroit, 304 N.W.2d 455 (Mich. 1981) 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Carolene Products Co., 304 U.S. 144 (1938) 7

Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478 (1975) 13

STATUTES

Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) 11

Civil Rights Act of 1964, Pub. L. No. 88-352, 80 Stat. 1281 (1964) 11

Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 (1968) 11

Housing Act of 1949, 63 Stat. 413 8

Housing Act of 1954, 68 Stat. 590 8

N.Y. E.D.P.L. § 208 23

N.Y. Pub. Off. §§ 84-90 23

COURT DOCUMENTS

Kaur Petition to the Court of Appeals 18

Record on Appeal to the Court of Appeals 17, 18

TABLE OF AUTHORITIES – Continued

Page

Brief of Amici Curiae Nat'l Ass'n for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Ass'n, Inc., and the Southern Christian Leadership Conf. in Support of Petitioners, 2004 WL 2811057 ..... 16, 20, 22

SECONDARY SOURCES

Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010) 8, 10

Amy Lavine and Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287 (2010) 19

Charles Toutant, *Alleging Race-Based Condemnation*, N.J.L.J., Aug. 2, 2004 14

COMMUNITY BOARD 9 MANHATTAN 197-A PLAN: HAMILTON HEIGHTS, MANHATTANVILLE, MORNINGSIDE HEIGHTS 29 (2007) 21

Daphne Eviatar, *The Manhattanville Project*, THE NEW YORK TIMES MAGAZINE, May 21, 2006 ..... 17, 18

David A. Dana, *Exclusionary Eminent Domain*, 17 S. CT. ECON. REV. 7 (2009) 13

David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sep. 10, 2001 14

TABLE OF AUTHORITIES – Continued

Page

DICK M. CARPENTER II, PH.D. & JOHN K. ROSS, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN at 6 (Institute for Justice 2007) 14

Gideon Kanner, *"Unequal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Takings Cases*, 40 LOY. L.A. L. REV. 1065 (2007) 19

Herbert J. Gans, *The Failure of Urban Renewal: A Critique and Some Proposals*, in URBAN RENEWAL (Bellush, ed.) 11

HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS (2d ed. 1982) 20

Jarrett Murphy, *History Lesson: Three decades after the drama of '68, will Harlem make room for Columbia?*, THE VILLAGE VOICE, May 16, 2006 21

Jody Arogeti, Anita Bhushan, Jill M. Irvin & Jessica Kattula, *Eminent Domain*, 23 GA. ST. U.L. REV. 157 (2006) 19

John A. Powell and Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 HOW. L.J. 433 (2003) 16, 20

TABLE OF AUTHORITIES – Continued

Page

Keith H. Hirokawa and Patricia Salkin, *Can Urban University Expansion and Sustainable Development Co-Exist? A Case Study in Progress on Columbia University*, 37 FORDHAM URB. L.J. 637 (2010) 17

Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. SOC'Y 31 (2002).....9

KENNETH JACKSON, CRABGRASS FRONTIER (Oxford Univ. Press 1987).....11

Michele Alexandre, *"Love Don't Live Here Anymore": Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1 (2008).....19

MINDY FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (One World/ Ballantine 2004).....22

Miriam Axel-Lute, *Will Columbia Take Manhattanville?*, SHELTERFORCE, Mar. 22, 2008.....17

New York City Dep't of City Planning, Manhattanville Final Environmental Impact Statement (2007).....14, 15

Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U.L. REV. 1 (2005)....13, 19

ROBERT CARO, THE POWER BROKER (1974).....11

TABLE OF AUTHORITIES – Continued

Page

SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION (1965) 20

Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999 (2007) 12

Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061 (2009) 21

Timothy Williams, *In West Harlem Land Dispute, It's Columbia vs. Residents*, THE NEW YORK TIMES, Nov. 20, 2006 21

U.S. Environmental Protection Agency, Environmental Justice Website 17

Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) 8, 9

INTEREST OF THE AMICUS CURIAE[1]

The amicus represents the 30th Senatorial District of New York, which encompasses the Manhattanville site of Columbia University's proposed expansion project. As the representative of residents and businesses who would be adversely affected by the project, amicus has a very strong interest in ensuring that development within the district proceeds equitably and fairly, especially for the district's minority and economically disadvantaged residents. These groups, although marginalized in the project approval process, would be disproportionately impacted by the expansion project.

STATEMENT OF THE CASE

Amicus adopts the statement of the case presented in the petition.

[1] The parties were notified ten days prior to the due date of this brief of the intention to file and consent was granted. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation of submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

SUMMARY OF REASONS TO GRANT THE PETITION

In this case, Respondent Empire State Development Corporation (ESDC) determined that Petitioners' well-maintained but not fully built-out properties were blighted in order to facilitate their transfer to Columbia University, a private and politically favored institution. The New York Court of Appeals, under the guise of deference to ESDC's administrative decision, abdicated its responsibility to provide meaningful review of Petitioners' pretext claims. This was not simply error, but a direct result of lower court confusion over the scope and applicability of this Court's decision in *Kelo v. New London*, 545 U.S. 469 (2005). The need for clarification of *Kelo*'s takings jurisprudence on pretext is especially important given the nature of urban redevelopment in the United States, which targets the most marginal and least influential communities. Far too often, its negative impacts have fallen disproportionately on racial and ethnic minorities and the economically disadvantaged. The Court of Appeals also rejected Petitioners' claim that their rights to procedural due process were violated by ESDC's willful obstruction of Petitioners' attempts to obtain public documents through the New York State Freedom of Information Law. This result runs counter to the spirit and intent of freedom of information laws, and demonstrates the need for this Court to establish minimum standards

of due process in the context of eminent domain proceedings.

REASONS TO GRANT THE PETITION

I. THE COURT OF APPEALS IGNORED THE MINIMUM FIFTH AMENDMENT SAFEGUARDS THIS COURT ARTICULATED IN *KELO* AND ABDICATED ITS RESPONSIBILITY OF JUDICIAL REVIEW

As argued in Petitioners' brief, the Court of Appeals ignored this Court's statement in *Kelo* that the Fifth Amendment prohibits a governmental entity from "tak[ing] property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit." *Kelo*, 545 U.S. at 478. Specifically, the court below ignored the factors discussed by Justice Kennedy and the *Kelo* majority as relevant to identifying impermissible favoritism toward specific private parties. *Kelo*, 545 U.S. at 450-51, 483-84; *Kelo,* 545 U.S. at 491-93 (Kennedy, J., concurring). The Court of Appeals' failure to even mention *Kelo* demonstrates its disregard for this Court's precedent.

Unlike the Court of Appeals, and in line with *Kelo*, the plurality decision of the First Department Appellate Division identified evidence of pretext and reviewed the record to determine the merit of Petitioners' claims. Relying on *Kelo*, the court identified a number of relevant factors, including:

> 1. The city's awareness of its depressed economic condition. . . .
>
> 2. The formulation of a comprehensive development plan meant to address a serious citywide depression.
>
> 3. The substantial commitment of public funds to the project before most of the private beneficiaries were known.
>
> 4. The city's review of a variety of development plans.
>
> 5. The city's choice of a private developer from a group of applicants rather than picking out a particular transferee beforehand.
>
> 6. The identities of most of the private beneficiaries being unknown at the time the city formulated its plan.
>
> 7. The city's compliance with elaborate procedural requirements that facilitate the review of the record and inquiry into the city's purposes.
>
> *Matter of Kaur v. N.Y.S. Urban Dev. Corp.*, 72 A.D.3d 1, 8-9 (App. Div. 1st Dep't 2009) (citing *Kelo*, 545 U.S. at 491-93 (Kennedy, J., concurring), *rev'd*, 15 N.Y.3d 235 (2010)).

Despite this Court's guidance in *Kelo* and the plurality decision of the appellate division below, the Court of Appeals discussed only one aspect of the case as relevant to the question of pretext: namely, the conflict of interest created by ESDC using the

developer's consultant to prepare one of the project's blight studies. *Matter of Kaur v. N.Y.S. Urban Dev. Corp.*, 15 N.Y.3d 234, 255 (2010). While this was certainly an important consideration relevant to Petitioners' claims, the court did not take into account Petitioners' other evidence of pretext. The court, did not mention, for example, that the project site had not been deemed blighted or included in an urban renewal area prior to Columbia's proposal. *Matter of Kaur v. N.Y.S. Urban Dev. Corp.*, 72 A.D.3d at 9. It did not acknowledge that Columbia – the developer – was the sole originator of the project and that no outside developers were solicited for proposals. *Id.* at 10. Nor did the court consider that Columbia's general project plan disregarded the long-standing community-based planning efforts of Community Board 9. *Id.* Additionally, the court failed to see the significance of Columbia "underwriting" (or "buying") the entire project planning process. *See id.* at 9-10. In all of these respects, the case at bar presents a much more likely scenario of pretext than *Kelo*, yet the same factors that rendered the *Kelo* condemnations constitutional under the Fifth Amendment were treated as mere surplusage by the Court of Appeals.

By refusing to consider Petitioners' evidence that the project is intended primarily to benefit Columbia, the court abdicated its responsibility to engage in judicial review and protect Petitioners' constitutional rights. *See Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). As

an appellate judge stated in a recent case, the Court of Appeals' decision in *Kaur* "made plain that there is no longer any judicial oversight of eminent domain proceedings." *Matter of Uptown Holdings, LLC v. City of New York*, 2010 N.Y. Slip Op. 07227 (App. Div. 1st Dep't 2010) (Catterson, J. concurring). While *Kelo's* definition of "public use" is indeed broad, the Fifth Amendment must not be read so broadly as to eliminate the judiciary's role to define the boundaries of the law. *See Cincinnati v. Vester*, 281 U.S. 439, 446 (1930) ("the question what is a public use. . . . remains a judicial one which this Court must decide in performing its duty of enforcing the provisions of the Federal Constitution."). As Justice Kennedy explained in his *Kelo* concurrence, "[a] court confronted with a plausible accusation of impermissible favoritism to private parties should treat the objection as a serious one and review the record to see if it has merit[.]" *Kelo*, 545 U.S. at 491 (Kennedy, J., concurring). Because the decision below reflects a basic disregard of *Kelo* and the minimum protections of the Fifth Amendment, this Court should accept certiorari to explain how *Kelo's* discussion of pretext is to be interpreted by the lower courts. If the decision is allowed to stand, it will prohibit all but the most toothless standard of judicial review in future condemnation cases. This result must be avoided.

II. THE BURDENS OF BLIGHT AND ECONOMIC DEVELOPMENT CONDEMNATIONS HAVE AND WILL CONTINUE TO FALL DISPROPORTIONATELY UPON RACIAL AND ETHNIC MINORITIES AND THE ECONOMICALLY DISADVANTAGED

There can be little doubt that blight removal and economic development condemnations disproportionately impact already marginalized groups, including tenants, the elderly, persons of low-income, and racial and ethnic minorities. Condemnees who belong to "discrete and insular minorities," as well as other disadvantaged groups, are not only marginalized in the political processes surrounding redevelopment projects, they are also confronted with especially severe impacts from displacement. *See Kelo*, 545 U.S. at 521 (Thomas, J., dissenting) (citing *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938)). Although this Court has recognized that blight removal and economic development takings generally serve public purposes, the prevalence of eminent domain abuse in the redevelopment setting and the fact that these takings also cause disproportionate harm to minority and low-income communities provides a compelling reason for this Court to grant review. The lower courts, as illustrated by this case, need guidance regarding pretext challenges, and the toothless judicial review required by the decision below will encourage redevelopment agencies to appropriate property for private purposes under the guise of economic development. The consequences, unfortunately, will be predictable: the benefits will

accrue to the wealthy and politically-connected, and the burdens will fall on those least able to bear them.

A. URBAN REDEVELOPMENT CONDEMNATIONS HAVE HISTORICALLY BEEN USED TO TARGET LOW-INCOME AND RACIALLY DIVERSE NEIGHBORHOODS

Local urban renewal programs proliferated in the 1950s and 1960s following the appropriation of federal funding for slum clearance[2] and this Court's broad approval of these projects in *Berman v. Parker*, 348 U.S. 26 (1954). While urban renewal programs did alleviate truly squalid and economically depressing conditions in many instances, they were often motivated as much by the interests of business elites and local governments in increasing central city tax revenues and luring wealthy residents back to urban areas.[3] They were also used to perpetuate racial segregation and limit the mobility of African Americans and other minorities. As the legal

---

[2] Housing Act of 1949, 63 Stat. 413; Housing Act of 1954, 68 Stat. 590. *See generally* Amy Lavine, *Urban Renewal and the Story of* Berman v. Parker, 42 URB. LAW. 423 (2010) (discussing the social and legal history of national urban renewal policies).

[3] *See, e.g.*, Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1 (2003) (discussing how "blight" was abused to benefit business and commercial interests); Lavine, *supra* n.2 (providing a historical account of the condemnation at issue in *Berman v. Parker*).

scholar and urban historian Wendell Pritchett has explained:

> Blight was a facially neutral term infused with racial and ethnic prejudice. While it purportedly assessed the state of urban infrastructure, blight was often used to describe the negative impact of certain residents on city neighborhoods. This "scientific" method of understanding urban decline was used to justify the removal of blacks and other minorities from certain parts of the city. By selecting racially changing neighborhoods as blighted areas and designating them for redevelopment, the urban renewal program enabled institutional and political elites to relocate minority populations and entrench racial segregation.[4]

The neighborhood that was at issue in *Berman v. Parker*, Southwest Washington, D.C., suffered just this fate. Although the project area did suffer from truly blighted conditions, *see Berman*, 348 U.S. at 30, the redevelopment also destroyed one of the few then-integrated parts of the city and forced thousands of predominantly African American residents out of

---

[4] Pritchett, *supra* n.3, at 6 (2003); *see also* Kevin Douglas Kuswa, *Suburbification, Segregation, and the Consolidation of the Highway Machine*, 3 J.L. SOC'Y 31, 53 (2002) (describing "a governing apparatus operating through housing and the highway machine [that] implemented policies to segregate and maintain the isolation of poor, minority, and otherwise outcast populations.").

their homes.[5] Shortly after the decision, affordability requirements for housing in the redevelopment area were removed from the plan, even though they were one of its most important justifications.[6] The advice of public housing officials was ignored and vast swaths of cleared land ended up lying vacant while housing options for low and moderate income residents dwindled.[7] Relocation assistance was often inadequate, a problem that was compounded by the fact that condemnation awards were routinely undervalued.[8] A tour of Southwest today does not convey these injustices, but the fact that it has matured into a functioning residential area does not diminish the harm that was inflicted in the process.[9] Simply stated, the ends do not always justify the means.

Berman's extremely deferential rational basis standard of review allowed urban renewal projects to go forward across the country with an astonishing lack of attention to the welfare of the people that the programs were supposed to benefit. For example, although urban renewal agencies were technically required by federal law to ensure that adequate housing would be available for displaced residents, relocation assistance was often "ruthless" in its

---

[5] Lavine, *supra* n.2, at 452.

[6] Lavine, *supra* n.2, at 467-69.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 474.

inadequacy.[10] And in many cities, the racial impacts of urban renewal projects were so egregious that they became known as "Negro removal."[11] The scale of municipal urban renewal programs, by itself, was often astonishing. In New York City alone, a conservative estimate is that at least 170,000 people were forcibly displaced during the 1950s and 1960s.[12]

Even if federal housing and slum clearance policies were based on benevolent intentions,[13] by the mid-1960s a consensus had formed that urban renewal was a social and governmental failure. Eventually, Congress recognized the institutional failures of the urban renewal program and enacted important changes to curb discriminatory practices.[14] The deeply

---

[10] Herbert J. Gans, *The Failure of Urban Renewal: A Critique and Some Proposals*, in URBAN RENEWAL 467-68 (Bellush, ed.) (noting that between 1949 and 1964, only .05% of federal urban renewal funding was spent on relocation).

[11] The term was coined during a 1963 interview of the writer and civil rights activist James Baldwin. A video of this interview is available on the PBS website, http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04b_qt.html. The transcript is available at http://www.pbs.org/wgbh/amex/mlk/sfeature/sf_video_pop_04b_tr_qry.html.

[12] ROBERT CARO, THE POWER BROKER 965-67.

[13] Many federal housing policies grew out of New Deal programs, and by some accounts they were intended more to stimulate the economy than to aid poor persons directly. *See, e.g.*, KENNETH JACKSON, CRABGRASS FRONTIER, at chapter 11 (Oxford Univ. Press 1987).

[14] The Civil Rights Act of 1964 provided a cause of action to challenge discrimination in public housing and federally funded programs. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat.

(Continued on following page)

troubling aftermath of *Berman*, however, stands as a reason to counsel prudence and caution in granting redevelopment agencies such broad powers of eminent domain. The instant case presents this Court with the opportunity to give lower courts guidance regarding private and pretextual takings, and this Court should do so to ensure that *Kelo*'s legacy does not become as stained as *Berman's*.

B. AS EXEMPLIFIED BY THIS CASE, BLIGHT REMOVAL AND ECONOMIC DEVELOPMENT CONDEMNATIONS CONTINUE TO HAVE DISPROPORTIONATE IMPACTS ON MINORITIES AND THE ECONOMICALLY DISADVANTAGED

Congress discontinued funding for urban renewal in the 1970s, leading local redevelopment agencies to rely more heavily on private capital for redevelopment projects.[15] The growing influence of private

---

241, tit. III (Desegregation of Public Facilities); *id.* tit. VI (nondiscrimination in federally assisted programs). In 1966, Congress passed the Widnall Amendment to the Housing Act, which required that a "substantial number" of residential units in redevelopment areas had to be affordable. 80 Stat. 1281 (1966). Finally, the Fair Housing Act was enacted in 1968 to eliminate redlining and discrimination in both public and private housing accommodations. Fair Housing Act, Pub. L. No. 90-284, tit. VIII, 82 Stat. 73 (1968).

[15] *See* Sheila R. Foster and Brian Glick, *Integrative Lawyering: Navigating the Political Economy of Urban Redevelopment*, 95 CALIF. L. REV. 1999, 2019-2021 (2007).

developers and employers fostered competition among local governments to retain and attract businesses, leading to the increased use of development subsidies, including eminent domain. Eventually, many jurisdictions, including New York, came to see the use of eminent domain to foster industrial and commercial development as a public use in itself, with or without the presence of blight. *See, e.g., Levin v. Township of Bridgewater*, 57 N.J. 506 (1971) (upholding the condemnation for shopping mall); *Karesh v. City Council*, 247 S.E.2d 342 (S.C. 1978) (upholding condemnation for convention center); *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981) (upholding condemnation for General Motors plant); *Yonkers Community Development Agency v. Morris*, 37 N.Y.2d 478 (1975) (upholding condemnation for Otis Elevator Company plant). *Kelo* reached the same result, holding that economic development, standing alone, is a public use.

Whether redevelopment takings are based on economic development or blight removal, however, "[t]here is ample evidence that localities across the nation are using eminent domain to discourage poor residents and to encourage the affluent, either through attractive (and high-priced) housing stock or retail facilities that both pay high taxes and attract an affluent clientele."[16] According to a 2007 study,

---

[16] Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U.L. REV. 1, 20 (2005); *see also* David A. Dana, *Exclusionary Eminent*

(Continued on following page)

"[e]minent domain project areas include a significantly greater percentage of minority residents (58%) compared to their surrounding communities (45%). Median incomes in project areas are significantly less ($18,935.71) than the surrounding communities ($23,113.46), and a significantly greater percentage of those in project areas (25%) live at or below poverty levels compared to surrounding cities (16%)." Similar disparities were found regarding education levels.[17]

Redeveloping Manhattanville as an exclusive Columbia campus would follow these patterns. Although only a relatively small number of residents would be directly displaced by the project – about 300, according to the environmental impact statement (EIS)[18] – between 3,000 and 5,000 residents living near the project site will be indirectly

---

Domain, 17 S. CT. ECON. REV. 7, 40-47 (2009) (discussing "exclusionary eminent domain"); Charles Toutant, *Alleging Race-Based Condemnation*, N.J.L.J., Aug. 2, 2004 (discussing litigation alleging that cities and towns target minority areas in an attempt to force them from the community in favor of those the local government considers more desirable); David Firestone, *Black Families Resist Mississippi Land Push*, N.Y. TIMES, Sep. 10, 2001.

[17] DICK M. CARPENTER II, PH.D. & JOHN K. ROSS, VICTIMIZING THE VULNERABLE: THE DEMOGRAPHICS OF EMINENT DOMAIN 6 (Institute for Justice 2007), *available at* http://www.ij.org/images/pdf_folder/other_pubs/Victimizing_the_Vulnerable.pdf.

[18] New York City Dep't of City Planning, Manhattanville Final Environmental Impact Statement 4-2 (2007), *available at* http://www.nyc.gov/html/dcp/pdf/env_review/manhattanville/04.pdf [hereinafter EIS].

displaced.[19] Displacement, moreover, will disproportionately affect low income and minority households. According to the EIS, 43.2% of the households in the primary study area have annual incomes of less than $20,000, compared with 25.4% for Manhattan and 29% for New York City as a whole. (The percentage of residents with annual incomes over $125,000, on the other hand, was only 4%, compared to 17.7% for Manhattan and 8.6% for the city.)[20] Regarding race and ethnicity, the EIS estimated that the primary study area was composed of 29.4% African Americans and 52.3% Latinos, compared with 15.3% and 27.2%, respectively, for Manhattan, and 24.5% and 27.2% for New York City as a whole.[21] When juxtaposed with the members of Columbia's elite Ivy League community, questions of class and race simply cannot be avoided. This is especially true in Harlem, one of the country's most important centers of African American culture.

The causes of these socioeconomic impacts are inherent to the process of urban redevelopment and the decision below will encourage this type of inequitable development throughout New York State and in other

---

[19] Although opponents have cited 5,000 as the number of Harlem residents threatened by indirect displacement, the environmental impact statement places that number at 3,293. *Id.* at 4-89. Accurate predictions of displacement effects are difficult to make.

[20] *Id.* at 4-16.

[21] *Id.* at 4-14.

states that adopt New York's policy of complete judicial deference. Economically disadvantaged and minority neighborhoods, even in the absence of intentional discrimination, are disproportionately affected by blight and redevelopment takings because they are more politically palatable targets than higher-income neighborhoods.[22] Condemnations are likely to face fewer challenges from tenants and residents with limited resources and little access to legal counsel, and the cost of acquiring land in low-income neighborhoods makes them economically attractive areas for developers and investors. *See Kelo*, 545 U.S. at 521-22 (Thomas, J., dissenting).

The inherently inequitable nature of redevelopment projects offends basic principles of Environmental Justice, which seeks to ensure "the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations,

---

[22] *See* John A. Powell and Marguerite L. Spencer, *Giving Them the Old "One-Two": Gentrification and the K.O. of Impoverished Urban Dwellers of Color*, 46 How. L.J. 433, 440-41 (2003) (discussing the "new frontier" ideology that draws redevelopment and gentrification toward low-income, working-class, and racially diverse communities); *Kelo v. New London*, Brief of Amici Curiae Nat'l Ass'n for the Advancement of Colored People, AARP, Hispanic Alliance of Atlantic County, Inc., Citizens in Action, Cramer Hill Resident Ass'n, Inc., and the Southern Christian Leadership Conf. in Support of Petitioners, 2004 WL 2811057 [hereinafter NAACP Amicus Brief].

and policies."[23] The top-down, Columbia-driven decision making process in this case exemplifies practices that were not designed to involve the West Harlem community in a meaningful manner.[24] The project will also produce inequitable distributions of both environmental goods and environmental burdens, another basic element of environmental injustice. The Harlem Piers Park, for example, which was built only after years of insistence from the community, will be effectively cut off from the rest of Harlem by Columbia's campus.[25] And while Columbia contends that the campus will be open to the public and will create

---

[23] U.S. Environmental Protection Agency, Environmental Justice, Basic Information, http://www.epa.gov/compliance/ej/basics/index.html.

[24] *See* Keith H. Hirokawa and Patricia Salkin, *Can Urban University Expansion and Sustainable Development Co-Exist?: A Case Study in Progress on Columbia University*, 37 FORDHAM URB. L.J. 637, 675-80 (2010); Miriam Axel-Lute, *Will Columbia Take Manhattanville?*, SHELTERFORCE, Mar. 22, 2008, *available at* http://www.shelterforce.org/article/print/213/ ("The fight over Manhattanville is a quintessential, if extreme, example of how difficult it is for communities to be heard when powerful institutional neighbors propose development or redevelopment.").

[25] A City Planning Department official acknowledged that "the open green space . . . could be perceived as an interruption of access to the river and as an enclave for Columbia." Record on Appeal to the Court of Appeals, R-19 at 628. *See also* Daphne Eviatar, *The Manhattanville Project*, THE NEW YORK TIMES MAGAZINE, May 21, 2006, *available at* http://www.nytimes.com/2006/05/21/magazine/21wwln.essay.html ("Many residents are disturbed by the placement of the campus between a park being built at the West Harlem Pier and the community that fought for years to have that park created.").

publicly accessible open space rather than obscuring it, it will nevertheless be privately-owned open space patrolled by a private security staff and controlled by Columbia's rules and policies.[26] Moreover, the project will actually result in a net decrease in per capita open space due to the additional population it will bring to the area,[27] and pollution from the project's construction will burden the existing residents and workers in nearby neighborhoods, rather than those who would eventually benefit from the redevelopment.

In addition to typifying the basic unfairness of the redevelopment process, this case also illustrates the inherent susceptibility of redevelopment projects to abuse and rent seeking. Public choice theory suggests that economic development agencies will be prone to capture by private interests,[28] and the result

---

[26] Kaur Petition to the Court of Appeals at 20 (explaining that the campus would only be open to the public until 8:00 PM between November and April, unlike city parks, most of which are open until 11:00 PM); Eviatar, *supra* n.25 ("It's a quad. That's not a piazza. That's not open space for a community.") (quoting Rev. Earl Kooperkamp).

[27] Kaur Petition to the Court of Appeals at 16; Record on Appeal to the Court of Appeals, R. 2 at 6-35 to 6-37.

[28] Public choice theory rejects the assumption that democratic governments represent the people and strive to serve a body of common public interests. Instead, "the 'public choice' school, argues that there is no such thing as the 'public interest,' only initiatives that help one private interest or the other. Laws adopted ostensibly to help the public are in reality the masked use of government to help one group at the expense of others[.]"

(Continued on following page)

is that "[t]he beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms." *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting). Moreover, many redevelopment agencies, ESDC included, are run by unelected boards that insulate them from public opinion and allow private interests to more easily influence the eminent domain process to their own advantage.[29] The extremely low threshold for finding blight in New York, *see Matter of Goldstein v. Urban Development Corporation*, 13 N.Y.3d 511, 527 (2009), gives even more advantage to politically connected developers. Unfortunately, the combination creates a perverse incentive for developers to seek blight determinations for economically desirable areas, rather than areas truly suffering from substandard conditions or market problems necessitating government intervention.

Blight removal and economic development takings also impose especially harmful burdens on the

---

Boudreaux, *supra* n.16, at 18; *see also* Michele Alexandre, *"Love Don't Live Here Anymore": Economic Incentives for a More Equitable Model of Urban Redevelopment*, 35 B.C. ENVTL. AFF. L. REV. 1, 14 (2008).

[29] *See* Amy Lavine and Norman Oder, *Urban Redevelopment Policy, Judicial Deference to Unaccountable Agencies, and Reality in Brooklyn's Atlantic Yards Project*, 42 URB. LAW. 287, 306-308 (2010); Gideon Kanner, *"Unequal Justice Under Law": The Invidiously Disparate Treatment of American Property Owners in Takings Cases*, 40 LOY. L.A. L. REV. 1065, 1082-83 (2007); Jody Arogeti, Anita Bhushan, Jill M. Irvin & Jessica Kattula, *Eminent Domain*, 23 GA. ST. U.L. REV. 157, 182 (2006).

people they displace. Residents often have limited resources to cope with displacement, and they are typically priced-out from returning after the completion of redevelopment. Instead, low-income households are typically forced to move to other low-income areas, thereby perpetuating problems related to concentrated poverty and increasing disparity in the distribution of social resources such as schools and transit.[30] Redevelopment projects also tend, perversely, to decrease overall affordable housing stocks such that rehousing options are often more expensive.[31]

The businesses located in urban renewal areas, which are often small and locally-owned, face similar relocation problems. In highly urbanized areas, certain types of "disfavored" businesses, such as beauty shops, auto repairs, and second-hand stores, may face particular difficulties in securing properly-zoned and affordable relocation sites. These businesses, however, offer important commercial services to neighboring areas, and they often provide increased opportunities

---

[30] *See* Powell and Spencer, *supra* n.22, at 441-42, 454-57; *see also* NAACP Amicus Brief, *supra* n.22, at *12.

[31] *See, e.g.*, HERBERT J. GANS, THE URBAN VILLAGERS: GROUP AND CLASS IN THE LIFE OF ITALIAN-AMERICANS 380 (2d ed. 1982) (indicating that 86% of the displaced residents in one redevelopment were paying higher rents at their new residences, with median rents almost doubling); SCOTT A. GREER, URBAN RENEWAL AND AMERICAN CITIES: THE DILEMMA OF DEMOCRATIC INTERVENTION 3 (1965) (citing multiple studies and concluding that "[a]ll ten . . . indicate substantial increases in housing costs").

for minority and low-income entrepreneurs.[32] In this case, industrial displacement will impact business owners and employees alike. As the local Community Board's plan explained, "[g]iven the combined factors of race, ethnicity, unemployment, limited educational attainment and concentration of such persons within specific areas of [Community District 9], it is important to note that industrial employment is an important economic sector to strengthen in order to elevate the socioeconomic well being of these residents and the city as a whole."[33] Columbia's project may produce permanent jobs, but many of the academic and institutional positions will be unavailable to existing neighborhood residents and employees.[34]

Moreover, contrary to the connotation of "just compensation," these economic harms are typically undervalued in the condemnation process. "The fact

---

[32] *See* Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. Ill. L. Rev. 1061, 1077-78.

[33] Community Board 9 Manhattan 197-a Plan: Hamilton Heights, Manhattanville, Morningside Heights 29 (2007), *available at* http://prattcenter.net/sites/default/files/users/images/CB9M_Final_24-Sep-07.pdf.

[34] *See* Timothy Williams, *In West Harlem Land Dispute, It's Columbia vs. Residents*, The New York Times, Nov. 20, 2006, http://www.nytimes.com/2006/11/20/nyregion/20columbia.html?pagewanted=all (quoting Jordi Reyes-Montblanc); Jarrett Murphy, *History Lesson: Three decades after the drama of '68, will Harlem make room for Columbia?*, The Village Voice, May 16, 2006, http://www.villagevoice.com/2006-05-16/news/history-lesson/1 (quoting Nellie Bailey).

that particular property is identified and designated for 'economic development,' . . . almost certainly means that the market is currently undervaluing that property or that the property has some 'trapped' value that the market is not currently recognizing."[35] Nor are condemnees entitled to any increased compensation based on the value of the property to the developer. As a result, their losses become a windfall for the taking's private beneficiaries.[36]

In addition to these economic impacts, displacement carries with it subjective harms as well. The elderly, for example, are particularly susceptible to psychological stress from being dislocated from their homes. Ethnic neighborhoods that have established social support networks also suffer particular harm from blight removal and economic development takings. In addition to destroying community support mechanisms, the destruction of these neighborhoods often impedes "those groups' ability to exercise what little political power they may have established as a community."[37]

---

[35] NAACP Amicus Brief, *supra* n.22, at *12.

[36] *Id.*

[37] *Id.*; MINDY FULLILOVE, ROOT SHOCK: HOW TEARING UP CITY NEIGHBORHOODS HURTS AMERICA, AND WHAT WE CAN DO ABOUT IT (One World/Ballantine 2004).

III. THE COURT OF APPEALS' HOLDING THAT ESDC DID NOT VIOLATE PETITIONERS' DUE PROCESS BY WILLFULLY OBSTRUCTING THEIR FOIL REQUESTS WAS INCORRECT AND DEMONSTRATES THE NEED FOR THIS COURT TO ESTABLISH MINIMUM STANDARDS FOR PROCEDURAL DUE PROCESS IN THE CONDEMNATION PROCESS

New York is unique among the states in denying condemnees a trial on the issue of public use. N.Y. E.D.P.L. § 208. Despite this already diluted procedural framework, however, ESDC resisted complying with Petitioners' Freedom of Information Law (FOIL) requests until after it had closed the administrative record. *See* N.Y. Pub. Off. §§ 84-90. The agency's obstructionist behavior, *see Matter of West Harlem Bus. Group v. ESDC*, 13 N.Y.3d 882 (2009), provides additional grounds to suspect pretext in this case, as does the Petillo email, which was finally produced by ESDC more than a year after the record was closed. *See* Petition at 35-36. More fundamentally, the agency's willful obfuscation offends the basic principles underlying freedom of information laws, which are intended to ensure a minimum amount of transparency in government operations. *See Fink v. Lefkowitz*, 47 N.Y.2d 567, 571 (1979) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). Allowing ESDC to impede the FOIL process, especially when Petitioners were precluded from bringing their claims to trial, is unjust and will only encourage redevelopment agencies to resist FOIL

requests to hide evidence of pretext and favoritism. The most minimal standards of procedural due process must proscribe this type of behavior, for a system that permits government agencies to willfully hide evidence of their unconstitutional motives denies condemnees any meaningful opportunity to challenge the taking of their property. This Court has not previously had the opportunity to define the minimum procedural due process requirements in the condemnation context, and should accept certiorari to clarify the issue.

CONCLUSION

This Court, in *Kelo*, recognized that pretextual motivations could render an economic development taking unconstitutional, but it declined to provide additional guidance on the issue until confronted with such a case. Amicus respectfully submits that this is such a case, and urges the Court to grant review to clarify the minimum requirements of the Fifth Amendment and ensure that Petitioners receive adequate judicial review. The easily manipulated character of urban redevelopment projects and the disproportionately negative racial and socioeconomic impacts inherent to the process, as exemplified in this case, make it even more imperative that this Court accept certiorari. This case also demonstrates the need to establish minimum standards of procedural due process owed to condemnees, and this Court should also grant the petition to resolve this important

question. For all of the foregoing reasons, amicus respectfully asks this honorable Court to grant the petition.

Respectfully submitted,

DENISE OUTRAM*
Harlem State Office Building,
Suite 912
163 West 125th St.
New York, NY 10027
212-222-7315
doutram@nysenate.gov

AMY LAVINE
ALBANY LAW SCHOOL
80 New Scotland Ave.
Albany, NY 12208
518-472-5849
alavine@albanylaw.edu

**Counsel of Record*

Counsel for Amicus Curiae